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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

WILLIAM ENDSLEY, et al.,

Petitioners,

-vs-

JOHN YOUNG,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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July 7, 1989

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QUESTIONS PRESENTED

1. Whether 46 U.S.C. Section 181, et seq., the so-called Limitation of Liability Act, provides an independent basis for federal maritime jurisdiction to limit the liability of pleasure boat owners in tort.

2. Whether 46 U.S.C. Section 181, et seq. was intended by Congress to apply to pleasure boats.

LIST OF PARTIES

The parties to the proceedings below were the petitioners, Janice Endsley, Executrix of the Estate of William Endsley and James Weycker and the respondent was John Young.

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IN THE SUPREME COURT OF THE UNITED STATES

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

The petitioners, Janice Endsley, Executrix, et al. and James Weycker, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on April 11, 1989.

OPINIONS BELOW

The opinion in the Court of Appeals for the Sixth Circuit entitled, In re John Young, William Endsley, et al. v. John Young, Case No. 88-3483 is published at 872 F.2d 176. It is also found in the appendix to this case. (Appendix A).

The opinion of the Federal District Court for the Northern District of Ohio is unpublished. It is entitled, In re John W. Young, Janice Endsley, Executrix, et al., v. John W. Young, Case No. C86-7903 (N.D. Oh. May 2, 1988). The opinion is also found in the appendix to this case. (Appendix B).

JURISDICTION

Invoking federal jurisdiction under 46 U.S.C. Section 181, et seq., the Respondent brought this suit in the United States District Court for the Northern

District of Ohio to limit his liability in tort from a pleasure boat explosion. On May 2, 1988 the Northern District of Ohio dismissed Respondent's action on the grounds that 46 U.S.C. Section 181, et seq., the so-called Limitation of Liability Act, does not apply to pleasure boats.

On Respondent's appeal, the Sixth Circuit Court of Appeals on April 11, 1989 entered a judgment and opinion reversing the Northern District's order and remanding the case to the Federal District Court for further proceedings on non-jurisdictional issues. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

46 U.S.C. Section 181, et seq.

STATEMENT OF THE CASE

This case arises from a pleasure boat explosion on Lake Erie in 1985. Two passengers, Endsley and Weycker, who were severely burned in the explosion, filed suit in the Defiance, Ohio Common Pleas Court alleging that the explosion resulted from repairs in the boat's fuel system negligently carried out by its owner, Young.

Thereafter, Young filed a petition in the Federal District Court for the Northern District of Ohio asking the Court to limit his liability to $7,000, the value of the damaged craft. Young asserted federal jurisdiction **exclusively** on the basis of 46 U.S.C. Section 181, et seq., the so-called Limitation of Liability Act (herein the "Limitation Act"). Simultaneously, Young sought and obtained an order staying further state court

proceedings pending the outcome of the federal petition to limit his liability.

The district court, after noting that "the clear weight of recent authority appears . . . to be in favor of not allowing the owners of pleasure vessels to come within the Act's limitation of liability," dismissed Young's petition "on the basis that the Act does not apply to the petitioner's vessel." The Court opined that "there is no indication that Congress, either at the time of initial adoption, or after, when it has subsequently amended the Act, has given any thought whatever to its application to pleasure craft."

On appeal, the Sixth Circuit Court of Appeals noted that Feige v. Hurley, 89 F.2d 575 (6th Cir. 1937), had decided that "the statute applies to 'any vessel.'" The court pointed out that while "Feige has met with disfavor in some quarters, and there

are district court decisions, even from within this circuit, which have refused to follow its holding," it could not overrule Feige "unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting *en banc* overrules the prior decision." The Court reversed and remanded the case to the district court for further proceedings.

Before In re Young was announced, but after it was submitted for publication, the United States Court of Appeals for the Seventh Circuit decided in the Matter of Everett A. Sisson, 867 F.2d 341 (7th Cir. 1989). In Sisson, the Seventh Circuit decided that a proceeding under the Limitation of Liability Act is cognizable in admiralty only when the underlying tort has a relationship to traditional maritime activity and, absent such a showing, the

"Limitation Act" does not provide an independent basis of federal court jurisdiction.

Since the "Limitation Act" was the sole basis asserted by Young for federal court jurisdiction, the decision in Sisson, prior to announcement of its decision in Young, presented the Sixth Circuit with a rationale for upholding the district court's decision on the grounds that the Seventh Circuit's holding in Sisson was both consistent with the result reached in the district court and further evidence of growing reluctance by courts to apply the Limitation Act to pleasure boat accidents. Instead, the Court, while acknowledging that Sisson "arguably reaches a contrary conclusion," simply reversed the district court on the basis that it was bound by the 1937 decision in Feige.

Because these conflicting circuit court decisions present this Court with an opportunity to resolve issues which may be the most important admiralty questions awaiting determination by the Supreme Court of the United States, we bring this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE SIXTH CIRCUIT'S DECISION (a) IMPLICITLY RECOGNIZES THAT 46 U.S.C. SECTION 181, ET SEQ. PROVIDES AN INDEPENDENT BASIS FOR FEDERAL JURISDICTION TO LIMIT THE LIABILITY OF PLEASURE BOAT OWNERS IN TORT; AND (b) CONFLICTS WITH A DECISION OF THE SEVENTH CIRCUIT.

Introduction

No maritime issue in recent years has generated more calls for help from the Supreme Court of the United States than the question of whether Congress intended the "Limitation Act" to apply to pleasure craft. While there is common agreement that the original purpose of the Limitation Act was to give protection to our then fledgling maritime industry, some courts, for reasons which are often obscure, have applied the Act to pleasure craft while other courts have found the application of this Act to pleasure boat accidents to be

inappropriate. In re Young and in the Matter of Everett A. Sisson are only two examples of why the absence of a decision from this Court on this basic admiralty issue has been a source of judicial confusion, conflicting results, unnecessary and duplicative litigation, and flagrant injustice to many innocent victims of pleasure boat accidents.

The conflict between these two circuit court decisions, therefore, provides this Court with an opportunity to resolve a question which has far reaching implications for millions of boat owners and users, for countless victims of pleasure boat accidents, for federal and state courts, and for the marine insurance industry.

A. The Conflict Between *Sisson* and *In re Young*.

In the Matter of Sisson

In Sisson, a fire aboard the Ultorian allegedly caused by a defective washer and dryer caused $275,000 of damage to other vessels docked in a marina. Sisson, the yacht owner, brought an action in the district court for injunctive and declaratory relief seeking to limit his liability to $800, the net value of his vessel after the fire. Sisson asserted jurisdiction under 28 U.S.C. Section 1333, which grants original jurisdiction to the district courts in all cases wherein admiralty or maritime jurisdiction lies.

The district court dismissed Sisson's complaint for lack of subject matter jurisdiction and Sisson then moved for reconsideration alleging that the Limitation of Liability Act, 46 U.S.C.

Section 181, et seq., provides a separate source of admiralty jurisdiction. The district court ruled that the Act did not provide a separate basis of federal jurisdiction, and overruled Sisson's motion for reconsideration.

On appeal, the Seventh Circuit noted that no other court has addressed the precise question "whether an action to limit liability is within the scope of admiralty jurisdiction when the underlying wrong bears no relation to traditional maritime concerns." The court agreed with the district court that a fire originating in a washer and dryer on a pleasure craft docked in a marina did not meet the nexus test for admiralty jurisdiction enunciated by this Court in Foremost Insurance Co. v. Richardson, 457 U.S. 668 (1982). The court rejected Sisson's argument that the Limitation Act independently confers

admiralty jurisdiction on federal courts and held at 867 F.2d 373:

> "that a proceeding under the Limitation of Liability Act will be cognizable in admiralty only when the underlying tort has a relationship to traditional maritime activity."

Since Sisson had failed to show a "nexus" between the underlying tort and traditional maritime activity, the Court upheld the district court's dismissal of Sisson's action to limit his liability.

In re Young

In re Young involved a petition by a pleasure boat owner to limit his liability to a total of $7,000, the salvage value of the scorched craft, for injuries and damages caused two guests who were severely burned when his boat exploded after taking on fuel at a marina. Young asserted the Limitation Act as his sole basis for federal court jurisdiction.

The district court agreed with respondent's argument that the Limitation Act was never intended by Congress to apply to pleasure craft and dismissed Young's petition on the basis that "the Act neither does nor should apply to pleasure vessels."

On appeal, the Sixth Circuit Court of Appeals acknowledged that "since there is common agreement that the original purpose of the Limitation Act was to give protection to our then fledgling maritime industry, we understand the reasoning of those courts which have found the application of this Act to pleasure boat accidents to be inappropriate." Faced with the 1937 Sixth Circuit holding in Feige that "the statute applies to 'any vessel,'" the Court turned to the question of whether this Court's decisions in Foremost Insurance Co. v. Richardson, 457 U.S. 668 (1982), and Executive Jet, Inc.

vs. City of Cleveland, 409 U.S. 249 (1972), had "shown Feige to be in error." The court reasoned that, while neither Foremost nor Executive Jet involved the Limitation Act, these decisions "laid to rest the notion that federal maritime law is not concerned with pleasure boat accidents." The court, therefore, concluded that while Foremost has not "resolved the issue presented in this appeal," [w]e do find it persuasive . . . on the issue as to whether intervening Supreme Court precedent nullified Feige." On that basis, the Court reversed the district court's holding that the Limitation Act does not apply to pleasure craft.

II.

THIS CONFLICT IN CIRCUIT COURT DECISIONS DEMONSTRATES A NEED FOR THE SUPREME COURT TO DECIDE WHETHER CONGRESS INTENDED THE LIMITATION ACT TO APPLY TO PLEASURE CRAFT.

These two circuit court decisions demonstrate why, particularly in light of this Court's decision in Foremost, there is a need for the Supreme Court of the United States to decide the basic question of whether Congress intended the Limitation Act to apply to pleasure craft. In one case, Sisson, the Seventh Circuit read Foremost as supplying the justification for limiting the scope of the Limitation Act on the grounds that a proceeding under the Act will be cognizable in admiralty only when the underlying tort meets the nexus test set forth in Foremost. In the other case, Young, the Sixth Circuit, while acknowledging that Foremost did not resolve the question of whether the Limitation Act

was intended by Congress to apply to pleasure craft, nevertheless found it "persuasive" in reaching a result which, it can be argued, recognizes the Limitation Act as providing an independent basis of federal jurisdiction and thereby widens its grasp far beyond what is permitted by the holding in Sisson.

The potential for confusion, conflicting results, and unnecessary litigation which these conflicting circuit court decisions create is self-evident. Sisson's reading of Foremost will henceforth confront federal courts, firstly, with the question whether pleasure boat owners, as a prerequisite for federal jurisdiction over limitation actions, must show that the underlying activity giving rise to a pleasure boat tort bears a sufficient relation to traditional maritime concerns to meet the

"nexus test" set forth in Foremost; and, secondly, what kinds of pleasure boat activities meet the nexus test and which do not. One does not have to be an ancient mariner to see that, in jurisdictions which choose to follow Sisson's reading of Foremost, the problem of sorting out which kinds of pleasure boat activities meet the nexus test and which do not will involve a juridical exercise bound to produce a misshapen body of law fraught with possibilities for conflicting results, countless appeals, and injustice.

In jurisdictions which choose, as the Sixth Circuit Court of Appeals apparently did in Young, to keep the lid on Pandora's box by treating the Limitation Act as providing an independent basis for federal jurisdiction, pleasure boat owners will be able to meet jurisdictional requirements in situations in which they

might not be able to do so in jurisdictions which follow Sisson. Inevitably, this will lead to conflicting decisions which will produce circumstances in which the mere fortuity of where a pleasure boat accident occurs will often determine whether or not a limitation action is available to pleasure craft owners and their insurers.

Surely the Sisson court understood that making the nexus test a prerequisite for federal jurisdiction of limitation actions would confront federal courts with a host of complex new questions in an area of law which even maritime scholars have sometimes found bewildering. Since the Sisson court might have avoided this result by following the weight of recent authority which has refused to apply the Limitation Act to pleasure craft, the court's decision not to reach the issue of the Limitation Act's applicability to pleasure craft can

arguably be seen as an attempt to limit the reach of the Limitation Act rather than to reach a decision which could result in a limitation of Sisson's liability for $275,000 in fire-related damages to a paltry sum of $800.

The Sisson decision, therefore, represents another compelling reason for this Court to decide whether Congress intended the Limitation Act to apply to pleasure craft. Until that question is decided, it seems clear that this unresolved question will continue to generate conflicting decisions. This realization may be what prompted Judge Ripple, in his concurring opinion in Sisson, to remark that "hopefully before long, the Supreme Court will revisit this quagmire and resolve the current ambiguity

generated by the courts of appeals in the wake of Foremost."

III.

THERE IS UNANIMITY AMONG COURTS AND MARITIME AUTHORITIES THAT THE QUESTIONS RAISED BY THIS PETITION ARE OF GREAT IMPORTANCE AND SHOULD BE RESOLVED BY THE SUPREME COURT OF THE UNITED STATES.

In re Young produced this comment from the Sixth Circuit Court of Appeals:

> "Due to the large number of pleasure boat accidents that occur every year, one would think that the question of the applicability of 46 U.S.C. §183(a) to pleasure boat accidents would have been settled definitively long ago, since the Act has existed since 1851. Unfortunately, such is not the case." 872 F.2d 176 (6th Cir. 1989).

As the number of pleasure craft on navigable waters of the United States has increased, the number of petitions to limit liability under 46 U.S.C. 181, et seq. have also multiplied. As the number of limitation actions has grown, courts and

commentators have come to recognize that the Limitation Act is a source of duplicative litigation, irrationally conflicting results, uncertainty for millions of pleasure craft owners and their insurers, and a cause of flagrant and indefensible injustice to innocent pleasure boat accident victims. This realization has led to a chorus of calls for the Supreme Court to settle the question of whether Congress ever intended the Limitation Act to apply to pleasure craft. What follows is a brief, but representative, sampling of this commentary:

> 1. "Since there is common agreement that the original purpose of the Limitation Act was to give protection to our then fledgling maritime industry, we understand the reasoning of those courts which have found the application of this Act to pleasure boat accidents to be inappropriate. However, as expressed earlier, we are compelled to follow Feige unless intervening

Supreme Court authority has shown Feige to be in error." In re Young, 872 F.2d 176 (6th Cir. 1989).

2. "The United States Supreme Court has never fully addressed the issue of whether the Limitation Act was intended to apply to vessels of a non-commercial nature . . . The recent trend among those district courts which have faced the issue, has been to hold that the Limitations Act does not apply to pleasure vessels." Estate of Lewis, 638 F.Supp. 217 (N.D. Calif. 1987) at 219, 220.

3. "There has been no decisive ruling from the Supreme Court on this issue . . . the historical extension of the Limitation Act occurred without congressional approval and allows for unjust and unnecessary repercussions." Matter of Lowing, 635 F.Supp. 520 (W.D. Mich. 1986), at 527-528.

4. "The Supreme Court has considered at least three cases involving pleasure boats and the limitation of liability. Coryell v. Phipps, 317 U.S. 406 (1943); Just v. Chambers, 312 U.S. 383 (1941), and Spencer Kellogg & Sons v. Hicks, 285 U.S. 502 (1932). . . . No issue was raised in any of these cases as to whether pleasure craft should be an exception to the Act . . . Baldassano v. Larsen, 580

F.Supp. 415 (D.C. Minn. 1984) at 417, 418."

5. "Admiralty jurisdiction is present, though we think the jurisdiction should be limited to exclude such cases as these." Complaint of Brown, 536 F.Supp. 750 (N.D. Ohio 1982).

6. "Surely, the limitation of liability to the value of the boat of an owner without 'privity or knowledge' of the fault in the context of a small pleasure craft capable of causing death or grievous injury is in conflict with our senses of justice and appropriateness . . . [W]e can perceive no reason to extend that protection to the relatively affluent owners of pleasure boats and their insurers at the expense of those injured or killed and their families." Richard v. Blake Builders Supply, Inc., 528 F.2d 745, 748 (4th Cir. 1975).

7. "The Limitation Act, originally passed to afford a measure of relief to a hard pressed and highly competitive industry, has become a charter of irresponsibility for a few wealthy individuals. The individual owner of, say, a small fishing vessel which explodes in port may well find himself liable to respond in damages under circumstances where the absentee yacht owner will go free.

> No theory can justify . . . results . . under which the owner of a yacht or speed boat, who is provident enough to hire someone else to run the boat for him, is granted a general license to kill or destroy. Gilmore & Black, The Law of Admiralty, 2d edition, 880-884 (1975).

These calls for the Supreme Court of the United States to answer the question of the Limitation Act's applicability to pleasure craft reflect a growing recognition by courts that the Limitation Act itself has frequently been a cause of well documented confusion, conflicting decisions, and unjust results, which are the subject of the next section of this brief.

IV.

THE QUESTIONS PRESENTED ARE OF GREAT PUBLIC IMPORTANCE BECAUSE THE CONFUSION AND UNCERTAINTY CAUSED BY THE LACK OF RESOLUTION OF THESE QUESTIONS ADVERSELY AFFECTS SUBSTANTIAL INTERESTS OF LITIGANTS, COURTS, MILLIONS OF PLEASURE BOAT OWNERS AND USERS, AND THE MARITIME INSURANCE INDUSTRY.

Much has been written about the irrationality of, and injustices caused by, the application of the Limitations Act to pleasure craft. Among the most thorough of these writings is a law review Note by Edward Carl Walton, cited by the district court in the instant case, entitled Pleasure Boat Owner Tort Liability in Admiralty: An Examination of the Limited Liability Act and A Proposal for Reform, 50 S. Cal. L. Review, 549 (1977). What follows is a brief outline of the unjust and irrational consequences of applying the act to pleasure craft discussed in this one study:

A. Unjust Consequences for Tort Victims:

1. Injured tort victims are often severely undercompensated;

2. Injured tort victims are forced to bear the cost of multiple lawsuits;

3. Tort victims are denied their traditional rights to their choice of forum and to trial by jury;

4. The fact that boat owners and their insurers, regardless of the merits of the claim, are able to force injured tort victims to face the delay and cost of defending against a petition to limit liability puts boat owners and their insurers in a position to use the Limitation Act as a means of extracting a settlement substantially below the actual value of the claim;

5. Successful petitions to limit liability results in a windfall for the marine insurance industry which collects premiums but doesn't have to pay claims which boat owners often believe to be covered by their policies at time of purchase.

B. Adverse Consequences for Federal and State Courts:

1. The Act often spawns a multiplicity of lawsuits from the same maritime accident;

2. An additional, unnecessary, and sometimes complicated court proceeding is added to what otherwise would be rather simple litigation;

3. Even where a tort victim proves privity in a petition proceedings,

he may still be required to offer the same evidence on liability in a separate action in another court;

4. Actions to limit pleasure boat owner liability represent an unnecessary additional burden for overworked federal courts.

C. **The Irrationality of Limiting Liability of Pleasure Craft Under the Act:**

1. The manifest legislative intent of the Act was to encourage investment in our nation's shipping industry and to keep it competitive with the commercial shipping industries in other nations, a purpose which is in no way served by limiting the liability of pleasure craft owners;

2. There is no good reason for not applying vicarious liability in maritime tort actions involving pleasure craft;

3. Insurers are allowed to receive full premiums but are able to limit their liability to the value of the boat;

4. The salvage value of a pleasure craft following an accident bears little rational relationship in many cases to the nature and extent of claimant's injury or to the owner's culpability;

5. Boat owners as a general class are financially able to insure themselves and their guests against

tort-related injuries and there is no rational reason for allowing marine insurers to effectively limit their own liability by asserting the Act on behalf of their insureds;

6. Neither courts nor scholarly commentators have been able to justify the extension of the Act to pleasure craft.

V.

CONFLICTING DECISIONS BETWEEN FEDERAL DISTRICT COURTS AND APPELLATE COURTS WITHIN THE SAME CIRCUIT ILLUSTRATE THE IMPORTANCE OF THE QUESTION PRESENTED AND THE NEED FOR RESOLUTION BY THE UNITED STATES SUPREME COURT.

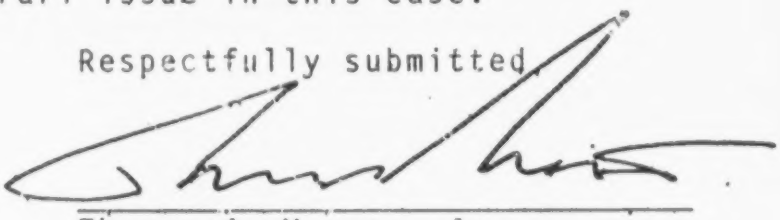
In its ruling that the Limitation Act does not apply to pleasure craft, the district court in Young noted that in all cases which the court had "been able to uncover that have been decided during the past decade have held that the Act does not apply to pleasure vessels." Similarly, the Court of Appeals in Young pointed out that "there is no doubt that there are a number of district court decisions which have refused to apply the provisions of 46 U.S.C. Section 183(a) to pleasure craft." What we have, therefore, is a state of affairs in which district courts are obviously looking for guidance on the questions raised by this petition and,

until such guidance is forthcoming, the Limitation Act will remain a source of confusion, conflicting decisions, and potentially unjust results.

CONCLUSION

For the foregoing reasons, the petitioners respectfully pray that a writ of certiorari issue in this case.

Respectfully submitted,



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APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
See Sixth Circuit Rule 24

No. 88-3483

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

In re John Young,
Petitioner.

WILLIAM ENDSLEY, et al.,
Plaintiffs-Appellees,

v.

JOHN YOUNG,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed April 11, 1989

Before: GUY and NORRIS, Circuit Judges; and BELL, District Judge.*

GUY, Circuit Judge. Title 46 U.S.C. § 183(a) (Limitations Act) reads in relevant part:

> The liability of the owner of any vessel . . . for any . . . loss . . . without the privity or knowledge of such

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*Honorable Robert Holmes Bell, United States District Court, Western District of Michigan, sitting by designation.

> owner . . . shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

The only issue presented for review is whether this limitation of liability provision is applicable to pleasure boats. The magistrate, who resolved this issue with the consent of the parties in the district court, concluded that it was not applicable. We disagree and reverse.

I.

Petitioner, John Young, was the owner of a motor boat built in 1968 and purchased by Young in 1983. The boat was used only as a pleasure craft for private recreational purposes. On May 25, 1985, Young was operating the boat on Lake Erie. Aboard were Endsley and Weycker. An explosion occurred injuring both Endsley and Weycker. Both instituted suit against Young in the Common Pleas Court of Defiance, Ohio. Young responded by going to federal court and filing a petition seeking exoneration or limitation of liability pursuant to the provisions of 46 U.S.C. § 185.

Due to the large number of pleasure boat accidents that occur every year, one would think that the question of the applicability of 46 U.S.C. § 183(a) to pleasure boat accidents would have been settled definitively long ago, since the Act has existed since 1851. Unfortunately, such is not the case. It has, however, to our satisfaction, been settled in this circuit. In *Feige v. Hurley*, 89 F.2d 575, 576 (6th Cir. 1937), in the context of a case involving a pleasure boat running into a canoe, we stated: "The statute applies to 'any vessel.' Appellee's motor boat was a fifteen-foot Chris Craft with a 70-horsepower motor, capable of going 35 miles per hour. It was within the statute." *Feige* has met with disfavor in some quarters, and there are district court decisions, even from within this circuit, which have refused to follow its holding. For example, in *Matter of Lowing*, 635 F. Supp. 520,

526 (W.D. Mich. 1986), the district judge stated "[i]t is apparent to this Court that the holding in *Feige v. Hurley* extending limitation to pleasure craft boats is not well grounded."[1] We do not have the luxury of being as cavalier as the court in *Lowing* relative to the *Feige* decision.

> A panel of this Court cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.

Salmi v. Secretary of Health and Human Services, 774 F.2d 685, 689 (6th Cir. 1985).

There is no doubt that there are a number of district court decisions which have refused to apply the provisions of 46 U.S.C. § 183(a) to pleasure craft.[2] It is also true that those courts which have applied it in recent times have done so begrudgingly for the most part. Nonetheless, no circuit court to date has refused to apply the statute to pleasure boats. *Richards v. Blake Builders Supply, Inc.*, 528 F.2d 745 (4th Cir. 1975); *Gibboney v. Wright*, 517 F.2d 1054 (5th Cir. 1975); *St. Hilaire Moye v. Henderson*, 496 F.2d 973 (8th Cir.), *cert. denied*, 419 U.S. 884 (1974); *The Oneida*, 282 F. 238 (2d Cir. 1922). We also note that in two cases the Supreme Court has assumed without discussion that the Limitations Act applies to pleasure craft. *Coryell v. Phipps* (The Seminole), 317 U.S. 406 (1943); *Just v. Chambers*, 312 U.S. 383 (1941).

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[1]The magistrate in this case treated *Feige* even more harshly, stating that the decision was "cursory and unilluminated . . . ."

[2]*See, e.g., Matter of Sisson*, 668 F. Supp. 1196 (N.D. Ill. 1987); *Complaint of Tracey*, 608 F. Supp. 263 (D.C. Mass. 1985); *Baldassano v. Larsen*, 580 F. Supp. 415 (D.C. Minn. 1984).

Since there is common agreement that the original purpose of the Limitations Act was to give protection to our then fledgling maritime industry, we understand the reasoning of those courts which have found the application of this Act to pleasure boat accidents to be inappropriate. However, as expressed earlier, we are compelled to follow *Feige unless* intervening Supreme Court authority has shown *Feige* to be in error. There appear to be two relevant Supreme Court cases. *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), and *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972).

Facially, *Executive Jet* appears to have little relevance to pleasure boat accidents. However, the decision contained language which arguably is relevant. *Executive Jet* involved the crash of a commercial aircraft into Lake Erie shortly after takeoff. The plaintiff invoked federal admiralty jurisdiction and brought suit in federal court in Ohio. The district court held that the suit was not cognizable in admiralty and dismissed the case. On appeal we affirmed, and the Supreme Court granted certiorari. In agreeing with our decision, the Supreme Court held:

> For this elementary reason, we conclude that the mere fact that the alleged wrong "occurs" or "is located" on or over navigable waters—whatever that means in an aviation context—is not of itself sufficient to turn an airplane negligence case into a "maritime tort." *It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity*. We hold that unless such a relationship exists, claims arising from airplane accidents are not cognizable in admiralty in the absence of legislation to the contrary.

409 U.S. at 268 (emphasis added). It is the underscored language that has been seized upon to lend support to the argu-

ment that pleasure boat accidents do not arise from "traditional maritime activity" and, thus, are not within the purview of the Limitations Act. *Executive Jet*, of course, was not dealing with the Limitations Act but, rather, admiralty jurisdiction in general. Nonetheless, there is at least superficial appeal to using the rationale of *Executive Jet* as an analogue. However, *Executive Jet* subsequently was severely limited by *Foremost Insurance*. In *Foremost Insurance*, the Court was presented directly with the issue as to "whether the collision of two pleasure boats on navigable waters falls within the admiralty jurisdiction of the federal courts." 457 U.S. at 669. The Court, albeit with three judges dissenting, answered in the affirmative. As to the issue of whether commercial activity had to be involved (the principal rationale of the cases which hold 46 U.S.C. § 183(a) inapplicable to pleasure boats), the Court reasoned:

> The federal interest in protecting maritime commerce cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually *engaged* in commercial maritime activity. This interest can be fully vindicated only if *all* operators of vessels on navigable waters are subject to uniform rules of conduct. The failure to recognize the breadth of this federal interest ignores the potential effect of noncommercial maritime activity on maritime commerce. . . . The potential disruptive impact of a collision between boats on navigable waters, when coupled with the traditional concern that admiralty law holds for navigation, compels the conclusion that this collision between two pleasure boats on navigable waters has a significant relationship with maritime commerce.

457 U.S. at 674-75 (footnote omitted). Again, *Foremost Insurance*, like *Executive Jet*, did not involve 46 U.S.C. § 183(a). However, it certainly laid to rest the notion that fed-

eral maritime law is not concerned with pleasure boat accidents.

We do not suggest that *Foremost Insurance* has resolved the issue presented in this appeal. We do find it persuasive, however, on the issue as to whether intervening Supreme Court precedent nullified *Feige*. It gives us sufficient strength to resist the urge to judicially legislate a solution as at least some of our colleagues on the district courts appear to be doing. If, indeed, anything is broken, it is up to Congress to fix it.[3] Accordingly, we reverse the decision of the magistrate and remand for further proceedings necessitated by the fact that the magistrate did not resolve two other issues raised by plaintiffs/respondents. These issues are whether Young's petition is time barred and whether he is able to meet the prerequisites of the Limitations Act, i.e., either non-negligent conduct or negligent conduct without privity and knowledge.

REVERSED and REMANDED.[4]

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[3]We note that a *negligent* owner is not relieved of liability unless he can prove lack of privity or knowledge. Negligence is usually the *sine qua non* of the underlying tort action which is probably why one does not see the issue raised here more frequently litigated.

[4]Subsequent to this opinion being submitted for publication, the Seventh Circuit decided *In the Matter of Everett A. Sisson*, Nos. 87-2713/2736 (7th Cir. Jan. 24, 1989). Although *Sisson* is factually distinguishable from the case at bar, it arguably reaches a contrary conclusion. Even if we were to agree with the decision in *Sisson*, our panel could not overrule *Feige*. However, we hasten to add that we do not subscribe to the reasoning of *Sisson*. As Judge Ripple points out in his concurrence, the opinion is predicated on an indefensibly narrow reading of *Foremost Insurance*.

APPENDIX B

Memorandum & Order

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C 86-7903

In re: John W. Young,

Petitioner,

Janice Endsley, Executrix, et al.,

Plaintiffs,

v.

John W. Young,

Defendant.

This is an admiralty case in which the petitioner has filed a petition under 46 U.S.C. Sec. 183(a), seeking a determination that his liability to the respondents (who are plaintiffs in a pending tort action) is limited under that statute. The petitioner was the owner of a

small pleasure boat, which he used primarily for sport fishing. On May 25, 1985, a fire occurred while the boat was on Lake Erie, and injuries were sustained by the petitioner's two passengers, who are the plaintiffs in the tort action and respondents in this case.

The parties consented to have this matter heard and determined and judgment entered by the undersigned, with appeal to the Sixth Circuit Court of Appeals. Trial was held, and upon filing of post-trial briefs, this matter has become decisional.

For the reasons that follow, I agree with the respondents that the limitation of liability set forth in Sec. 183(a) is not applicable to pleasure boats of the type involved in the accident giving rise to this litigation. Consequently, the petition shall be dismissed.

The statute at issue provides in pertinent part that the liability of the "owner of any vessel, . . ., for any . . . loss . . . without the privity of knowledge of such . . . owner . . ., shall not, . . ., exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." In practical terms, the effect of this provision, if it applies to the boat in this case, is that the petitioner's liability is limited to $7,000, as that was the "amount or value" of his interest in the boat.

In order to conclude that this statute does not apply to the petitioner's boat, two principal obstacles must be acknowledged and overcome: first, the language of the statute, and, second, prior decision in this Circuit and District. Upon careful and thorough consideration of the manifest statutory purpose and the

adverse consequences of applying the Act to pleasure boats, on the one hand, and the reasoning taken in the recent cases that have considered this issue, on the other, I am persuaded that the correct interpretation is that which I reach in this opinion.

The statutory language, which refers to "any vessel," presents the first obstacle to applying the statute in less than an all-encompassing manner. There is, however, persuasive scholarly authority that supports the interpretation that this language, in the overall context of Sec. 183 as the Act has been amended since initial enactment in 1851, can appropriately be interpreted to exclude pleasure craft from the Act's protection. See, Note, Pleasure Boat Owner Tort Liability in Admiralty: An Examination of

the Limited Liability Act and a Proposal for Reform, 50 S. Cal. L. Rev. 549, 571-579 (1977).

Moreover, as noted by Chief Judge Miles of the Western District of Michigan In re Lowing, 635 F.Supp. 520, 523 (W.D. Mich. 1986), the terminology used in the statute suggests that it was designed to apply to commercial, rather than pleasure vessels. The amount of the owner's liability is fixed at the amount or value of the owner's interest in the vessel "and her freight then pending." As Judge Miles noted, "one does not usually think of a pleasure boat, of any type, as having any 'pending freight.'"

This reading of the statute, which seeks to extract meaning from all of its terms, is strongly supported by reference to the legislative history, which Judge Miles discusses at length and in detail.

It is clear from the statements of the Act's proponents that it was designed to provide protection for American merchant sailors. Id. at 522; Note, supra, 50 S. Cal. L. Rev. at 572-574. There is no indication that Congress, either at the time of initial adoption, or after, when it has subsequently amended the Act, has given any thought whatsoever to its application to pleasure craft.

Unquestionably, the tail of legislative history should never be allowed to wag the substance of a statute's terms. But here I find no conflict between the language of the statute and the legislative history and the exclusive focus on vessels employed in maritime commerce. The issue, rather, is whether to give that language a more expansive reading than there is any reason to believe its authors would have given to it, had they foreseen the

development, sale, and use of the hundreds of thousands of vessels that form a private armada touching directly the lives of millions of our citizens.

I am persuaded that the statute was not intended to hold the owners of such vessels largely harmless of the injuries that might be caused as a result of their ownership and operation. Certainly, were I writing on an entirely clean slate, I would have no hesitation in concluding that the Act does not limit the liability of the owner of a pleasure boat.

But the slate, though not particularly cluttered with controlling judicial precedent, is hardly clean. In particular, before ruling in this case that the Act does not apply, acknowledgement must be made of the fact that both the Sixth Circuit, in Feige v. Hurley, 89 F.2d 575, 576 (6th Cir. 1937), and a Judge of

this District, in Complaint of Brown, 536 F.Supp. 750 (N.D. Ohio 1982) (Aldrich, J.), have held that the owners of private pleasure craft can claim the Act's protection.

The more binding of these decisions, Feige, is also the easier to address. The Sixth Circuit's treatment of the issue of the statute's applicability was cursory and unilluminated by the scholarly research that underlies Judge Miles' decision. Though one cannot say whether the Court, had it been apprised of the congressional intent at the time the law was enacted, would have agreed with the approach taken herein, it is also clear that the Court's decision does not take the legislative history at all into account. Thus, even as a subordinate judicial officer, I believe that I can cautiously disagree with that decision and proceed to

a different result without disregarding grievously my obligation to abide by controlling precedent.

As a general rule, Magistrates should consider themselves bound by decisions of the District Judges to whom they are subordinate and answerable. . Thus, I am at least presumptively obligated to conform my ruling in this case to that reached by Judge Aldrich in Brown. That I do not do so reflects, quite simply, a sincere conviction that the approach taken by Judge Miles in Lowing more accurately reflects a correct interpretation of Sec. 183(a) and its scope and purpose.

In taking this course, I take note of the fact that, aside from Brown and a case decided in 1978, Armour v. Grandler, 448 F.Supp. 741 (W.D. Pa. 1978), all cases on this issue that I have been able to uncover that have been decided during the

past decade have held that the Act does not apply to pleasure vessels. In addition to Judge Miles' decision in Lowing, these including In re Sisson, 668 F.Supp. 1197, 1198 (N.D. Ill. 1987) (dictum), Complaint of Shaw, 668 F.Supp. 524 (S.D. W. Va. 1987), In re Tracey, 608 F. Supp. 263 (D. Mass. 1985), and Baldassano v. Larsen, 580 F.Supp. 415 (D. Minn. 1984).

The clear weight of recent authority appears, therefore, to be in favor of not allowing the owners of pleasure vessels to come within the Act's limitation of liability. Included among these decisions are opinions that are contrary to prevailing appellate court holdings. Lowing, supra; Shaw, supra.

Upon a reading of the cases on both sides of the question and the scholarly commentary that has addressed this issue, and upon consideration of the legislative

history and manifest purpose of Sec. 183(a), I conclude that the Act neither does nor should apply to pleasure vessels. Were I in doubt on either of those matters, I would simply base a ruling in favor of the petitioner on Feige and Brown. But I am persuaded that my judicial duties are most appropriately fulfilled in accordance with my Oath and station by the holding that I reach, and the decision that I make to dismiss the petition on the basis that the Act does not apply to the petitioner's vessel.

It is, accordingly,

ORDERED THAT the petitioner's petition be dismissed; the Clerk shall enter judgment accordingly.

So ordered.

/s/James G. Carr
United States Magistrate